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Human Rights & South African Constitutionalism: An Interdisciplinary Perspective on Debates over the past Twenty Years¹

Jonathan Klaaren

This paper explores three South African debates over the past twenty years to outline an interdisciplinary perspective on South African constitutionalism. Two of these debates were set firmly within law, the third less so. The first two debates took place within the explicit formal framework of administrative law, although the application of that very framework was part of the contest in both. The third debate, regarding the HIV/AIDS epidemic, is widely recognized to have both legal dimensions and dimensions beyond the law. Within the framework of socioeconomic rights, all three debates provide some content to a South African tradition of constitutional and deliberative democracy. Part of the intention in this effort is to consider the possibility of reaching out to other disciplines and scholars beyond those identified within the doctrinal legal community to creatively understand South Africa's continually forming and reforming constitutional tradition. Another purpose is to pose the question of whether there is enough distance, after twenty years of constitutional democracy, to gain some purchase on current constitutional debates by exploring past ones in their historical context.

The Debate over the Scope of Rights

A debate occurring at the outset of South Africa's experience with constitutional democracy was conducted in large part around and by Etienne Mureinik. Before his death in the mid-1990s, Mureinik was a professor of public law at the School of Law of the University of the Witwatersrand, Johannesburg (Wits). He participated incisively in the robust debates in the legal community on the shape and content of constitutionalism. Mureinik's piece on the culture of justification, entitled "A Bridge to Where? Introducing the Interim Bill of Rights," is perhaps the single most-cited piece

in legal literature on the new constitutional order and was very influential in court judgments.² Its content provides a link to the culture of the South African constitution in a state of formation; the article has found its way into a preferred spot on the assigned reading lists of law schools in South Africa and abroad.

Mureinik's "A Bridge to Where?" generally pointed to the necessity of actions being justified, juxtaposing an apartheid culture of authority with a democratic one of persuasion:

If the Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.³

Some have seen in the piece a purely judicial impulse. However, that reading misses the force of Mureinik's point, which was intended to apply to institutions through the regime of South African democracy. The broad reading of Mureinik's argument can be seen in his depiction of the culture of authority—a culture which was manifest not only in the doctrine of Parliamentary supremacy, but also in the ethic of obedience, an ethic indulged in by government bodies, private institutions, and individuals. Mureinik's concept of justification did not apply to the judiciary alone, but also to Parliament and independent institutions.⁴ Indeed, reading it most broadly, it is a call for a deliberative democracy that would encompass debate amongst all of South Africa's citizens. This point of the far-reaching impact of the Constitution has been elaborated upon especially by the work of Karl Klare and Dennis Davis in their writing (both separately and jointly) on transformative constitutionalism.⁵

In addition to raising these fundamental issues of constitutional theory, Mureinik discussed two more specific and equally penetrating issues regarding the limitation of rights and the right of administrative justice. With respect to the then-existing limitations clause (section 33 of the interim Constitution), Mureinik raised at least two points of principle. First, he famously made

the point that the categories in the limitations clause were “both too few and too many.”⁶ By that, he meant that three tiers were too few to cover the full diversity of circumstances and that this limited the range of categories and introduced an element of arbitrariness. Second, he argued that certain rights should be illimitable, discussing in particular the prohibition against detention without trial.⁷ In Mureinik’s view, this right should never be limited in a constitutional democracy.

While it should be obvious where he would have stood in today’s terrorism debates, Mureinik’s position should not be misunderstood as that of an absolutist civil libertarian. He recognized that there was scope for interpretation of the right against detention without trial, just as there was scope for interpretation of the right of administrative justice. Indeed, he felt that this interpretive effort and richness meant simply that the debate could happen in these rights rather than in the limitations. This particular stance is one that should be very familiar to most students of American constitutionalism, who work with a constitutional text without a general limitations clause. Throughout this argument and woven through Mureinik’s article, there is an implicit reliance on critical inquiry. But this reliance did not take the form of a dogmatic defence of the freedom of speech. Instead and interestingly enough, Mureinik embedded within his discussion of the limitations clause his specific treatment of, and defence of, the freedom of speech. For him, the most crucial debate was the democratic one concerning the boundaries and content of the Bill of Rights.

In “A Bridge to Where?” Mureinik also assessed the right of administrative justice—a clause that could potentially play a significant role in the achievement of the culture of justification and that had been for him a lifelong interpretive labour. Welcoming the relative entrenchment of this right in the Bill of Rights, Mureinik nonetheless pointed to a number of ambiguities in the administrative justice clause.⁸ His conclusion was essentially that courts had their work cut out for them in fashioning a coherent theory of the administrative justice clause as it had been encapsulated in the interim Constitution. Mureinik proposed a rule for resolution of these debates, which would hold for the right to administrative justice, but which might also be thought to hold more broadly. This rule would hold that “any ambiguity should be resolved in the way which optimizes the Bill’s capacity to foster a

culture of justification.”⁹ Mureinik’s prediction was borne out by events as the post-apartheid courts initially struggled to put the right to administrative justice and its implementation through a statute into a firm spot in the South African legal system.

With the benefit of hindsight, one can see that even these two separate points of perceived arbitrariness in limiting rights and ambiguity in administrative justice were linked. In other words, Mureinik’s understanding of the general limitations clause and the justification that it demanded centred around and derived from his understanding of administrative law, as shown in his discussion of administrative justice. The central concerns of his piece were its discussions of limitations, liberty (a topic of administrative law under apartheid), administrative justice, and freedom of information. Reading the piece twenty years later, its brief treatments of the substantive topics of labour, religion, and affirmative action appear as supplements or add-ons.¹⁰ While these topics have been fleshed out in the jurisprudence of the South African constitutional democracy of the past twenty years, they were not so apparent in 1994. Mureinik indeed decried the influence of the lobby that wished to insulate labour legislation from justificatory review as well as the influence of the religious lobby. Had it been up to him, the labour and religion clauses of the Bill would most likely have been drafted differently—Mureinik identified and implicitly supported interpretations leading to constitutional scrutiny of labour law and rules for religious observances at state or state-aided institutions. With respect to affirmative action, however, Mureinik explicitly drew upon the approach of resolving ambiguity in a way which “optimizes the Bill’s capacity to foster a culture of justification.”¹¹

It might seem that a focus on Mureinik’s work at the post-apartheid outset must remain within a blinkered appreciation of only civil and political rights. If proved, such a charge would be a serious one, but the debate in which Mureinik engaged made a necessary and explicit link to one of the defining features of South African constitutionalism—its entrenchment of socioeconomic rights. Indeed, the linkage between the right of administrative justice and the limitations clause for Mureinik can be seen even more explicitly in a second influential article of his on the socioeconomic rights debate.¹²

At a time when the notion of including socioeconomic rights within the Constitution was still quite controversial within a number of different constitutional camps, Mureinik argued in favour of constitutionalizing economic rights. Indeed, he was arguing in part against his close colleague Dennis Davis's case for directive principles, rather than entrenched socioeconomic rights.¹³ Mureinik identified three arguments against the constitutionalisation of such rights: the expense argument ("that economic rights cost a great deal of money to enforce, and that the judges should not be doing the spending"), the indeterminacy argument (that content of economic rights is "inherently vague and indeterminate"), and the positiveness argument (to realize economic rights "requires action rather than inaction—and that that makes them unsuitable for judicial enforcement").¹⁴ Mureinik identified the essential difficulty common to all three arguments: "that an economic right can be realized in more than one way, and that judges lack the expertise and accountability which would qualify them to choose among the alternatives."¹⁵ Mureinik questioned this objection and offered another approach, through several hypothetical examples in a well-known and oft-cited passage:

Take the right to nutrition. It entails a commitment to eradicate starvation. . . . If in court the government could not offer a plausible justification for the programme that it had chosen—if it could not show a sincere and rational effort to eradicate starvation—then the programme would have to be struck down. The court therefore would be reviewing policy choices, not making them. This would of course limit its powers, but they would be far from meaningless. Under a constitutional right to health care, for instance, a court might well have been able to quash the legislation which created fourteen departments of health. The court would have asked whether any plausible argument could be advanced to show that to be a sensible way of delivering medical assistance. If it found multiple bureaucracies to be a senseless squandering of precious resources, the court would have been bound to intervene.¹⁶

Mureinik offered a further scenario that he clearly felt was unlikely to come to pass: "The court might likewise intervene if the annual Budget appropriated funds to build a replica of St. Peter's, or perhaps a nuclear submarine, before the rights of

education promised by the constitution had been delivered.”¹⁷ Mureinik recognized that justification could be in the eye of the beholder, but argued that what was important was that the eye be a public one:

It is true, of course, that some would seek to justify what many would regard as entirely unreasonable programmes. What if the government tried to defend its nuclear submarine or its replica of St. Peter’s on the ground that they increase employment and wealth, and that the economic benefits which trickle down from such programmes to the poorest off are the most effective way of meeting their basic economic needs? To that the answer must be this: if the government is confident of the economic case, let it make it in court, where it can be exposed to scrutiny. If the government could adduce economic evidence and argument to make a plausible case, the court would have to uphold the programme.¹⁸

As it turned out, of course, perhaps aided in some part by Mureinik’s advocacy, the firm entrenchment of socioeconomic rights became, if not the sole defining feature of South African constitutionalism, at least one of them.

The Debate over the Minimum Core

A second debate also instructive for an interdisciplinary perspective extends beyond one particular scholar and explicitly touches upon social and economic rights. The Constitutional Court has of course repeatedly affirmed the justiciability of socioeconomic rights. Nonetheless, its first encounter with the actual text of these rights was not promising. In *Soobramoney*, the Court rejected the argument that the Constitution offered a remedy to a man who was pleading for access to health care in the specific form of kidney dialysis treatment.¹⁹ In *Grootboom*, however, the Court was willing to come to the aid of a group of squatters deprived of any right to shelter in the midst of a cold and rainy Cape winter.²⁰ In this second case, the Court articulated the reigning reasonableness test for the enforcement of these rights, a test that has been confirmed in the later cases of *Treatment Action Campaign* and *Mazibuko*.²¹

Arguably, during its first twenty years of constitutional democracy, South Africa *was* the global cutting edge of the doctrine of socioeconomic rights. At least among national scholars, the terms of the academic debate regarding socioeconomic rights were chiefly concerned with two issues. Primarily (and arguably even to the displacement of other issues), the debate has focused on whether there should be any recognition of a minimum core to those rights.²² Secondly, the debate has asked whether the administrative law paradigm or one based in the right of equality is the most appropriate framework within which to view the Court's treatment of socioeconomic rights. One could add to this list the concern for the appropriate shape and depth of remedies for the enforcement of socioeconomic rights, but this debate seems to be largely (though not entirely) derivative of the debates on the minimum core and on the appropriate paradigm for analysis.²³

A 2004 case on socioeconomic rights decided by the Constitutional Court treats the second of these questions—whether the framing is best done via equality or via administrative justice—as well as raising a further question. *Khosa v Minister of Social Development* concerned an application made by Mozambican nationals who had been granted permanent residence in South Africa in December 1996 after having fled civil war.²⁴ These persons were destitute, and would have qualified for old-age grants, but for their nationality. In a jointly heard case, similar applications were made for child-support and care-dependency grants by non-nationals with permanent residence.

The further question raised in *Khosa* is again one of limitations. The Constitutional Court judgment in this case contained an interesting recognition of a hitherto purely academic debate.²⁵ This debate has been conducted among the likes of Marius Pieterse, Andre van der Walt, and Pierre de Vos as well as others.²⁶ The doctrinal issue is whether the standard of limitation and justification in the limitations clause will meet with or exceed that of the reasonableness test enunciated in *Grootboom*. The Court majority decided that even if the “threshold of reasonableness” of the limitations clause was more demanding than that for the socioeconomic right of section 27, that threshold would be met in *Khosa*.²⁷

A second doctrinal issue engaged in the case concerns the overlap of the equality aspects of the case with the socioeconomic rights aspects and the difference, if any, that overlap makes.

Indeed, the majority and the minority differed on whether this was a socioeconomic rights case or an equality case. For the majority, Mokgoro J took the view that it was a socioeconomic rights case.²⁸ This doctrinal issue roughly tracks the academic debate concerning the appropriate paradigm for analysis of the socioeconomic rights cases.

Linking These Two Debates

What do these two debates that occurred ten years apart have to do with each other? At a formal level of legal doctrine, one of the questions posed is precisely the same: should we subject a right to the limitations clause? Mureinik advocated the nonapplication of the limitations clause to the right of detention without trial. In *Khosa*, Mokgoro J appears to suggest that there may not be much of a role, if any, for the limitations clause with respect to rights such as the right to social security.

Still at a formal level, but perhaps at a slightly deeper level of disciplinary conceptualizations, is another question that is almost precisely the same between the two debates: to what extent does administrative law provide the appropriate tools for thinking about these issues, or does another paradigm (equality or dignity perhaps) provide a better analytic framework? As noted above, Mureinik used the administrative law notions of plausibility, justification, and reasonableness to frame the movement away from apartheid that was led by the Bill of Rights, not only in interpreting the administrative justice clause, but more generally. Likewise, the Constitutional Court has deployed the notion of reasonableness to frame its enforcement of socioeconomic rights. The two debates appear to share a thick thread.

Indeed, even at a more specific level, there are a number of doctrinal contributions that the first debate can make to the second one. One contribution is that administrative law does not need to be understood narrowly, such as along the lines of the test of reasonableness only. Twenty years ago, Mureinik explored and used the full spectrum of administrative law in the Bill of Rights debate and so should we in the current socioeconomic rights debate. For instance, in a separate subsection of administrative law, the principles of review in instances of governmental inaction or delay may be of help in charting the way forward in the

socioeconomic rights debate.²⁹ To take one contemporary example with respect to the health care system, the current government has trained and graduated at least three hundred clinical associates, who are health professionals designed to deliver high-quality medical care at a fraction of the investment of a fully trained doctor. This post is akin to that of a physician's assistant in a number of U.S. states, including North Carolina. Yet because of the failure of the state to provide a scope of work (e.g., to professionally license this new cohort of health care workers), these professionals are unable to contribute to addressing the continuing shortage of health care in the public health care system.³⁰

As a second doctrinal contribution, the conceptual resources of administrative law can assist with understanding the interplay of constitutional and legislative texts in the South African legal system. The administrative justice clause in the interim constitution was South Africa's first attempt to codify and entrench administrative law outside of the practice of the courts. Constructively critical of this effort, Mureinik pointed out some of the arguably arbitrary ways in which this clause was written. The result—at least in part of Mureinik's criticisms—was that the next time codification and entrenchment of administrative justice was to be attempted (in the 1996 Constitution), it would be done by statute due to the placement in the Constitution of a legislation-forcing clause in section 33.³¹ Ironically, this clause received criticism, being viewed not as a site of reinforcement, but as a site of dilution. Likewise, for social and economic rights, it will be both important and difficult to grapple with the interplay of legislation and constitutional text in the achievement of socioeconomic rights.

But, in any case, there is another point of connection between these two debates, this one at a non-doctrinal level—beyond the form of the law. It resides within the notion of justification. If we approach administrative law (and indeed law generally) from the point of view of justification in a non-doctrinal sense, we see that the primary issue in both of these debates was around law as an interpretive practice: to whom, and for whom, and on whose behalf, is law speaking? The connection in this sense points us to the socio-legal dimensions of the two debates.

Socio-legal scholarship has, of course, several different varieties of exploring law as an interpretive practice. For instance, the

new institutionalist perspective led by scholars such as Lauren Edelman explores the meaning of employment rights and remedies within private organizations, linking organizational sociology to legal studies.³² Another angle is the more ethnographic and cultural studies perspective often associated with the work of Austin Sarat. One of his coauthored studies, for instance, looked at how law is made at the interface between divorce lawyers and their clients who, when discussing their cases, do so in language and discourse dripping with gendered and class concepts as well as with constructed notions of what “the law” should be and do.³³ It is possible, with the oftentimes relatively large linguistic gaps between clients and lawyers (at least public interest clients and lawyers), that a similar study might find less interactivity in the South African context. In any case, among legal academics and scholars in South Africa, the understanding of law as a fundamentally interpretive practice is probably most closely associated with the school of transformative constitutionalism: the above-cited works of, for example, Karl Klare and Dennis Davis as well as the work of Johan van der Walt.³⁴ For instance, Klare’s “Transformative Constitutionalism” is based on a critique of adjudication, seeing it at base as an interpretive practice conducted within a global political economy.³⁵ The focus on South Africa does not deny the importance of global position for these debates. As Heinz Klug has pointed out, the global context has been crucial, and perhaps in greatest part as a constraint.³⁶

Within interpretivist approaches, there are two tentative South African paths that can be only pointed to here but not explored in full depth. The first is in relation to a bridge that to date has proved to be a bridge too far i.e., the bridging of the disciplines of law and economics. *Soobramoney* was close to this boundary and was interpreted as a signal by some lower courts to “back off” socioeconomic rights cases due to questions of economics. This interdisciplinary discussion is only just beginning to take place within South African policy and academic circles.³⁷ There is another more direct line of inquiry gaining some ground in South Africa—empirical interpretivism—and some of Daniel Brand’s work is along these lines. The focus here is on the empirical variety of interpretivism extant in the South African academy, with scholars like Brand as distinct from the tradition of critical empiricism associated with, for instance, Johan van der Walt. In

one piece, Brand has called for the exploration of life-histories at the micro level, such as that of Kas Maine, as a response to the Constitutional Court's rejection of the minimum core argument.³⁸ Brand refers here to the acclaimed work by the social historian Charles van Onselen, *The Seed is Mine* (1996), which takes 649 pages to trace the life of a black sharecropper through the apartheid fluctuations of South African farming life from 1894 to 1985.³⁹

As I will explore in the third debate below, South African legal scholars may benefit from casting their net even further. Even the South African school of transformative constitutionalism ought to be seen more widely than by legal scholars, as is the present case. In particular, I would suggest that there is a range of scholars beginning to address issues through the prism of the South African Constitution and constitutionalism more broadly understood from the disciplines of history, sociology, and philosophy.⁴⁰

The Debate over Life and Death in a Time of AIDS

This section presents a further example of the richness that may be gleaned by casting our disciplinary net wider than the legal academy often does. However, this example does not stray beyond the bounds of the contemporary concern with socioeconomic rights. Instead, it focuses on one of those still-urgent issues: the epidemic of AIDS within South Africa in particular and southern Africa more generally. Moreover, it is an argument that concludes with a proposition that is at the same time both very constitutional and very unconstitutional: that the President has a duty to speak. By “unconstitutional” I mean not that if the President were to so speak, this speech would violate the Constitution, rather that it would be considered quite unlikely that such a legal duty would indeed be enforced by a court.⁴¹

This specific argument has been made by Deborah Posel, a South African sociology professor.⁴² Interestingly, Posel made this argument both in constitutional terms and as part of an institution—the Wits Institute for Social and Economic Research (WiSER) at the University of the Witwatersrand—that has specifically undertaken to participate in debates within the public sphere.⁴³ Her intervention was undertaken in response to a perception of narrowing terms in the South African public debate.

Posel's argument can be seen to fit with the school of jurisprudence traceable to Robert Cover—a school in which Austin Sarat works and which emphasizes the degree to which law is an interpretive exercise played out on a field of pain and violence.⁴⁴ It would be worth exploring the contours of this argument with greater attention to the interrelationship between the socio-economic rights and the right to life and death in cases such as *Sobramoney* and *TAC*.⁴⁵

Written in a philosophical tone of critical humanism, akin to the work of Paul Gilroy and Charles Taylor, Posel's unorthodox socioeconomic rights argument proceeds in two steps. First, she argues that the right to life is given additional content and substance by the right to dignity and by the concept of Ubuntu. As she puts it:

The right to life, then, entails the right to a life which is marked by respect, dignity, freedom, and also encompasses a right to support, compassion and inclusion from the community—all the more so, given the country's pre-democratic history. This presumably spans the nation as well as small and immediate communities. So the right to life is also associated with some strong obligations on the part of others, as well as the state, to acknowledge many modes of moral, social and cultural interdependency and to act in ways that promote and strengthen it. And these obligations are that much more compelling, in the light of the denial of dignity in the past.⁴⁶

In this first step, Posel's argument proceeds with reading rights (these rights in particular, but also rights in general) as historicized. Thus, for Posel, "the right to dignity is itself a form of historical reparation, restoring that which was denied in the past."⁴⁷ In itself, this is a form of rights interpretation that is not practiced much in the legal academy, with some significant exceptions.⁴⁸

Yet it is her second step that truly breaks free of the sorts of boundaries that the legal academy might well have imposed. In her second step, Posel argues that the South African constitutional tradition includes the duty to speak in the face of massive rights violation: "Does the prerogative of political power in our democracy in a time of AIDS, and in the midst of memories of past suffering, not entail the positive obligation to reinstate

the dignity of people with AIDS as members of our democratic community, as much as citizens with their own particular needs and entitlements?"⁴⁹ She bases this proposition in part on the experience of the Truth and Reconciliation Commission (TRC), the signal institution of the new South Africa: "The idea of the TRC links the concept of our humanity to our capacity and prerogative to speak. The right to speak, and to be heard, is fundamentally constitutive of being human, as well as being humane."⁵⁰

Small points aside (such as the best interpretation of debates over the validity of legal texts), Posel is certainly correct on at least three relevant grounds. First, she is accurate in her depiction of the philosophical bases of the Constitutional Court's current jurisprudence.⁵¹ Second and perhaps more importantly, the constitutional place of the TRC is indeed worth reflecting upon. Some, but not enough, empirical work on the key amnesty process of the TRC has been published.⁵² Just because the empowering provisions for the TRC are no longer part of the text does not mean that they are not part of the tradition. And, third, we in the post-TRC academy should explore non-lawyerly ways of engaging in reflection and response.

What Posel is doing is engaging with and pulling from formal legal judgments (the content of the underlying constitutional discourse) on the right to life and the right to dignity, and then managing to move toward a duty on the President to speak. This is quite a feat. Lawyers are fond of saying that if one cites and depends upon the right to life in a legal argument, the argument is in trouble with the court and is unlikely to carry the day. But from another perspective, it is precisely these sorts of troubling arguments that one wants to make within a constitutional democracy that undertakes to at least listen to all its citizens. If the broadening of democracy was the project of pre-apartheid struggle, then its deepening and enrichment (in the interdisciplinary rather than purely economic sense) is at least a major part of the post-apartheid project. In works such as those explored above, there is a challenge that we may recognize as addressed not only to past, current, and future presidents of South Africa, but also to legal and constitutional scholarship.

Endnotes

¹ Versions of this article were delivered at conferences held at the University of the Western Cape and at the University of KwaZulu-Natal. The helpful contribution of comments and criticism received on those occasions is appreciated as well as the later comments of Penny Andrews.

² Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights," *South Afr. J. Hum. Rights* 10 (1994): 31.

³ *Ibid.*, 32.

⁴ *Ibid.*, 36.

⁵ Karl E. Klare, "Legal Culture and Transformative Constitutionalism," *South Afr. J. Hum. Rights* 14 (1998): 146; Dennis Davis and Karl Klare, "Transformative Constitutionalism and the Common and Customary Law," *South Afr. J. Hum. Rights* 26 (2010): 403, http://0-reference.sabinet.co.za.innopac.wits.ac.za/webx/access/electronic_journals/ju_sajhr/ju_sajhr_v26_n3_a1.pdf (last visited Sep 3, 2014).

⁶ Mureinik, *supra* note ___ at 33.

⁷ *Ibid.*, 35. "Detention without trial is arguably the polar opposite of a culture of justification."

⁸ Ironically, his criticism of the clause exposed the need for the implementation of administrative justice through legislation, a project that might appear to be a limitation of administrative justice, but was nonetheless a project that he supported.

⁹ Mureinik, *supra* note ___ at 46.

¹⁰ *Ibid.*, 44–46.

¹¹ *Ibid.*, 46.

¹² Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution," *South Afr. J. Hum. Rights* 8 (1992): 464.

¹³ D. M. Davis, "Case against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles," *South Afr. J. Hum. Rights* 8 (1992): 475.

¹⁴ Mureinik, *supra* note ___ at 465–468.

¹⁵ *Ibid.*, 468.

¹⁶ *Ibid.*, 471–472.

¹⁷ *Ibid.*, 472.

¹⁸ *Ibid.*, 472.

¹⁹ *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997), <http://www.saflii.org/za/cases/ZACC/1997/17.html> (last visited Sep 3, 2014).

²⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), <http://www.saflii.org/za/cases/ZACC/2000/19.html> (last visited Sep 3, 2014).

²¹ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002), <http://www.saflii.org/za/cases/ZACC/2002/15.html> (last visited Sep 3, 2014); *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009), <http://www.saflii.org/za/cases/ZACC/2009/28.html> (last visited Sep 3, 2014).

²² The minimum core approach requires priority to be given to the worst off in society through placing a heavy burden of justification on any society that fails to meet the minimal interests of individuals. It also requires concrete steps to be taken towards realizing a higher level of provision that guarantees individuals the necessary conditions for realizing a wide range of purposes. David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford Univ Press, 2007).

²³ For one proponent of the equality side of the doctrinal debate as well as an accounting of the other side, see Murray Wesson, “Grootboom and Beyond: Assessing the Socioeconomic Jurisprudence of the South African Constitutional Court,” <http://www.escr-net.org/docs/i/401105> (last visited Sep 3, 2014).

²⁴ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004), <http://www.saflii.org/za/cases/ZACC/2004/11.html> (last visited Sep 3, 2014).

²⁵ At least from a doctrinal point of view, it seems that these limitations and administrative/equality questions are the prior questions that drive the differences around the economics and resources points discussed in different ways by Ngcobo and Mokgoro JJ.

²⁶ Marius Pieterse, “Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases? Residents of Bon Vista Mansions v Southern Metropolitan Local Council,” notes: *South Afr. Law J.* 120 (2003): 41–48; A. J. Van der Walt, “The Constitutional Property Clause: Striking a Balance between Guarantee and Limitation,” *Prop. Const.* (1999): 109–146; Pierre De Vos, “Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa’s 1996 Constitution,” *South Afr. J. Hum. Rights* 13 (1997): 67.

²⁷ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004), *supra* note ___ at 84.

²⁸ *Ibid.*, 102.

²⁹ Sunstein has explicitly pointed to these principles as being of helpful application. Cass R. Sunstein, “Social and Economic Rights? Lessons from South Africa,” *Const. Forum* 11 (1999-2001): 123.

³⁰ Mark Heywood, *Public and Private Health Systems and the Quality of Care*, <http://wiser.wits.ac.za/event/public-and-private-health-systems-and-quality-care> (last visited Sep 3, 2014).

- ³¹ Jonathan Klaaren, “Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information,” *South Afr. J. Hum. Rights* 13 (1997): 549.
- ³² Lauren B. Edelman and Mark C. Suchman, “The Legal Environments of Organizations,” *Annu. Rev. Sociol.* 23 (1997): 479–515.
- ³³ Austin Sarat and William L. F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (New York: Oxford University Press, 1997); Austin Sarat and Thomas R. Kearns, *The Fate of Law* (Ann Arbor: University of Michigan Press, 1993).
- ³⁴ Johan Van Der Walt, “Law as Sacrifice, 2001” *J. South Afr. Law* 710-728 (2001).
- ³⁵ Klare, *supra* note ____.
- ³⁶ Klug, Heinz. *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*. Cambridge: Cambridge University Press, 2000.
- ³⁷ Andres Johannes Van der Walt, *Theories of Social and Economic Justice* (Sun Press, Stellenbosch, 2005).
- ³⁸ Daniel Brand and Sage Russell, “Exploring the Core Content of Socioeconomic Rights,” *South African and International Perspectives* (2002): 99-108.
- ³⁹ Charles Van Onselen, *The Seed is Mine: The Life of Kas Maine, a South African Sharecropper, 1894-1985* (New York: Hill and Wang, 1996).
- ⁴⁰ Deborah Posel and Graeme Simpson, “Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission” (2002); Deborah Posel, “Race as Common Sense: Racial Classification in Twentieth-Century South Africa,” *Afr. Stud. Rev.* 44 (2001): 87-114; J.-A. Mbembe and Libby Meintjes, “Necropolitics,” *Public Cult.* 15 (2003): 11-40.; Achille Mbembe, “The Banality of Power and the Aesthetics of Vulgarly in the Postcolony,” *Public Cult.* 4 (1992): 1-30; Keith Breckenridge, “‘We Must Speak for Ourselves’: The Rise and Fall of a Public Sphere on the South African Gold Mines, 1920 to 1931,” *Comp. Stud. Soc. Hist.* 40 (1998): 71–108. This is a necessarily incomplete list.
- ⁴¹ *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (4 August 2004), <http://www.saflii.org/za/cases/ZACC/2004/5.html> (last visited Sep 3, 2014).
- ⁴² Deborah Posel, “Democracy in a Time of AIDS,” *Interventions* 7 (2005): 310–315.
- ⁴³ In the interests of full disclosure: on secondment for a year, the author was part of the founding staff of this institution, the Wits Institute for Social and Economic Research (WISER), and is currently appointed as a Visiting Professor affiliated with WISER, www.wiser.wits.ac.za.
- ⁴⁴ Robert M. Cover, “Foreword: Nomos and Narrative,” 97 *Harv. Law Rev.* 4-68 (1983).
- ⁴⁵ *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997), *supra* note ____; *Minister of Health and Others v Treatment Action Campaign and Others*

(No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002), *supra* note ____.

⁴⁶ D. Posel, "Democracy in a Time of AIDS." P. 313.

⁴⁷ D. Posel, "Democracy in a Time of AIDS." P. 312.

⁴⁸ Pierre De Vos, "A Bridge Too Far? History as Context in the Interpretation of the South African Constitution," *South Afr. J. Hum. Rights* 17 (2001): 1.

⁴⁹ D. Posel, "Democracy in a Time of AIDS." Pp. 314-315.

⁵⁰ D. Posel, "Democracy in a Time of AIDS." P. 314. This variety of humanism is thus shot through with a duty to speak: "Indeed, being human and being humane are close to being coterminous. One of the philosophical premises of the TRC is that in the midst of horror and suffering, silence is inhumane. Community, in an important sense, is constituted as a particular kind of speech act; its boundaries are defined by those who are party to the act of speech."

⁵¹ For instance, the majority stated in *Khosa*: "The rights to life and dignity, which are intertwined in our Constitution, are implicated in the claims made by the applicants." Para 41 (citing *S v Makwanyane*).

⁵² A. Pedain, "Was Amnesty a Lottery? An Empirical Study of the Decisions of the Truth and Reconciliation Commission's Committee on Amnesty," *South African Law Journal* no. 121 (2004): 785-828.

